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No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1960

TOWSON PRICE, PETITIONER

v.

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 52a)[1] is reported at 168 F. Supp. 392, *sub nom Price* v. *Folsom*. The order of the District Court amending its opinion (R. 70a) is not reported. The opinion of the Court of Appeals (Pet. App. 19–25) is reported at 280 F. 2d 956.

[1] All record references are to the Appendix submitted by petitioner in the court of appeals and filed here pursuant to Rule 21 of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1960. A timely petition for rehearing was denied on October 12, 1960. The petition for a writ of certiorari was filed on January 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1954 amendment to Section 203 of the Social Security Act, 68 Stat. 1073, 42 U.S.C. (1952 ed., Supp. V) 403 ..akes a self-employed attorney's earnings from his practice a basis for deductions from benefits payable under the Act.

2. Whether, if the 1954 amendment imposes such deductions from benefits on persons who were awarded benefits prior to its enactment, it violates the Fifth Amendment in that it deprives those persons of vested property rights.

3. Whether the Social Security Administration correctly determined that the term "substantial services", as utilized in Section 203 of the Act with reference to deductions from monthly benefits, is to be measured by an individual's work activity in the course of a month, and not by the remuneration received therefor.

STATUTES INVOLVED

The pertinent provisions of Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (1952 ed.) 401, *et seq.*, are set forth in the Statement, *infra*, pp. 3–6.

STATEMENT

Petitioner, an attorney, was employed by the Westinghouse Electric Corporation until July 1, 1954, when he was retired on a pension at the age of sixty-five. On that date, he filed an application for Old Age Insurance Benefits with the Bureau of Old Age and Survivors Insurance of the Social Security Administration. On July 10, 1954, he was awarded monthly benefits of $85.00, which were subsequently increased to $98.50 as of September 1954. On January 1, 1955, petitioner began to pursue the practice of law as a self-employed attorney. In 1955, he performed legal services during all twelve months, and received an income in excess of $2,080.00 from his practice (R. 41a, 54a).

At the time petitioner began to receive Old Age Insurance Benefits, and until January 1, 1955, a self-employed attorney's earnings from his practice were neither "covered" under the Social Security Act for benefit purposes,[2] nor deductible from benefits other-

---

[2] Section 211 of the Act, as amended, 64 Stat. 502, 42 U.S.C. (1952 ed.), 411 which defined "self-employment" for purposes of the Act, excluded from the scope of that term the performance of services by a lawyer. The Section provided in pertinent part:

> (a) *The term "net earnings from self-employment" means the gross income*, as computed under chapter 1 of the Internal Revenue Code, *derived by an individual from any trade or business carried on by such individual*, less the deductions * * *
>
> * * * * * *
>
> (c) *The term "trade or business", when used with reference to self-employment income or net earnings from self-employment*, shall have the same meaning as when

wise payable under the Act.[3] In 1954, Section 203 of the Act, relating to deductions from insurance benefits, was amended to read, in pertinent part, as follows (68 Stat. 1073, 42 U.S.C. (1952 ed., Supp. V) 403):

* * * * *

(b) Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments

---

used in section 23 of the Internal Revenue Code, except that shall term *shall not include* * * *

(1) The performance of the functions of a public office;

(2) The performance of service by an individual as an employee (other than service described in section 210(a)(16)(B) performed by an individual who has attained the age of eighteen);

(3) The performance of service by an individual as an employee or employee representative as defined in section 1532 of the Internal Revenue Code;

(4) The performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(5) *The performance of service by an individual in the exercise of his profession as a* * * * *lawyer* * * *; [Emphasis added.]

[3] Section 203(b) of the Act, as amended, 64 Stat. 489, 42 U.S.C. (1952 ed.) 403(b), provided in pertinent part:

(b) *Deductions*, in such amounts and at such time or times as the Administrator shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 202 *for any month*.

* * * * *

(2) in which such individual is under the age of seventy-five and *for which month he is charged* * * * *with net earnings from self-employment* of more than $75; * * *. [Emphasis added.]

under this title to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 202 for any month—

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provision of subsection (e) of this section; * * *

* * * * *

(e) For the purposes of subsections (b) and (c)—

* * * * *

(2) If an individual's earnings for a taxable year of twelve months are in excess of $1,200, the amount of his earnings in excess of $1,200 shall be charged to months as follows: The first $80 of such excess shall be charged to the last month of such taxable year, and the balance, if any, of such excess shall be charged at the rate of $80 per month to each preceding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. * * * Notwithstanding the preceding provisions of this paragraph, no part of the excess referred to in such provisions shall be charged to any month * * * (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (4) of this subsection) of more than $80.

(3) * * *

(B) For purposes of clause (D) of paragraph (2)—

(i) An individual will be presumed, with respect to any month, to have been engaged in

self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in paragraph (4) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

(4)(A) An individual's earnings for a taxable year shall be (i) * * * his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

(B) In determining an individual's net earnings from self-employment and his net loss from self-employment for purposes of subparagraph (A) of this paragraph and subparagraph (B) of paragraph (3) of this subsection, the provisions of section 211, other than paragraphs (1), (4), and (5) of subsection (c), shall be applicable; * * *

Section 211 of the Act, 42 U.S.C. (1952 ed.) 411, insofar as here relevant, was not altered by the 1954 amendment. Section 211(a), (*supra*, fn. 2) defines "net earnings from self-employment" as gross income derived by an individual from any trade or business carried on by him. Section 211(c)(5) excluded from the term "trade or business", "the performance of service by an individual in the exercise of his profession as a * * * lawyer * * *."

The Bureau of Old Age and Survivors Insurance determined that, pursuant to the amended Section 203 of the Act, as petitioner's income from his practice in 1955 had exceeded $2,080.00 and he had rendered substantial services every month, deductions should have been made from his benefits in all twelve months, thereby extinguishing the year's benefits (R. 32a). As the $1,182.00 in benefits had already been disbursed to him, petitioner was requested to refund this amount to the Government.

Dissatisfied with the determination of the Bureau, petitioner sought and received a hearing before a Referee of the Social Security Administration. Petitioner contended that, since his earnings from the self-employed practice of law were not covered for benefit purposes under the amended statute, the statute should not be construed as imposing deductions from benefits because of such earnings. He argued also that, even if the amended statute did impose deductions with respect to non-covered earnings, the new deduction provision should not be construed to apply to petitioner, who had been awarded benefits prior to its effective date. He argued further that, if the new provision did apply to him, it was unconstitutional in that it deprived him of vested property rights which he had acquired on being awarded benefits, prior to amendment of the statute. Finally, petitioner urged that, in any event, as he had not received net income in excess of $80.00 in any of the months of April, June, July, August, October, and November of 1955, no deductions could

be imposed for those months. He reasoned that, under the provisions at Section 203 (e)(2)(D) and (e)(3)(B), *supra*, pp. 5-6, a self-employed person could not be considered to have rendered substantial services in a month unless he had earned more than $80.00 in that month.

The Referee rejected all of petitioner's contentions, holding that he had received an overpayment of $1,182.00 in benefits in 1955, recovery of which should not, under the circumstances, be waived as "against equity and good conscience" (R. 49a). The Referee ruled, first, that in view of the language of the 1954 amendment and its legislative history it was clear that Congress intended to make earnings from occupations not covered by the Act a basis for deductions from benefits. He also ruled that the new provision applied to petitioner, and he noted as to petitioner's constitutional argument that the right to benefits under the Social Security Act is not contractual in nature, but is merely a statutory right which is alterable at the will of Congress. As to petitioner's final argument, the Referee held that the statutory term, "substantial services", "means work and activity in the prosecution of a profession and * * * is not measured by the amount of remuneration received during a period" (R. 46a). Petitioner's request to the Appeals Council of the Social Security Administration for review of the Referee's decision was denied (R. 51a).

Subsequently, petitioner brought this suit for declaratory judgment in the United States District Court for the District of New Jersey to review the

administrative decision,[4] raising the contentions which he had presented before the Referee. The District Court granted a motion for summary judgment by the Secretary of Health, Education and Welfare and resolved the issues in the same way as had the Referee (R. 52a–66a).[5] On petitioner's appeal, the Court of Appeals affirmed (Pet. App. 20–25).

ARGUMENT

The petition raises issues of statutory construction which have been resolved against petitioner by the administrative authorities and the two courts below. The rulings on these issues are plainly correct and do not require further review by this Court. Petitioner's constitutional argument—that rights acquired under the Social Security Act are contractual in nature and may not be altered by Congress—was recently considered and rejected by the Court in *Flemming* v. *Nestor*, 363 U.S. 603.

1. Petitioner's argument that the 1954 amendment to Section 203 of the Social Security Act did not change the existing law, but continued to exempt a self-employed attorney's earnings from the computation of deductions from retirement benefits (Pet. 8–10), is untenable. The language of the 1954 statute and its legislative history compel the conclusion

[4] Petitioner made the Westinghouse Electric Corp., his former employer, a defendant so that he might obtain a declaration as to his retirement pension rights. This claim was severed from the present action and stayed pending final determination of petitioner's rights under the Social Security Act (R. 53a).

[5] The court's opinion was later amended in minor respects (R. 70a).

that its clear purpose was, for the first time, to make earnings from the self-employed practice of law deductible from benefits otherwise payable under the Act, although the self-employed practice of law was itself to remain a noncovered "trade or business" for benefit purposes.

Before and after the 1954 amendments to the Act, Section 211, which provides the definition of "self-employment" for the Act, excluded, by virtue of 211(c)(5), the self-employed practice of law from the scope of the term. *Supra,* fn. 2. Accordingly, that occupation was not among those covered by the Act for benefit purposes. Prior to the 1954 amendment, Section 203(b) made one basis of deductions from benefits the "net earnings from self-employment." *Supra,* fn. 3. As the definition of "self-employment" in Section 211 was thus incorporated into Section 203(b), earnings from the self-employed practice of law were not deductible from benefits.

As noted *supra,* pp. 6–7, Section 211 was not, in the respects here relevant, altered by the 1954 amendment, thus leaving self-employed lawyers in a "noncovered" occupation. However, the deduction provision of Section 203(b) was amended to make deductible *"any earnings* under the provisions of subsection (e) of this Section" (emphasis added). Paragraph 4 of subsection (e) of Section 203, a new paragraph, provided in 4(A) that an individual's "earnings" for a taxable year were to be his net earnings from self-employment for the year minus any net loss from self-employment for the year. Subsection 4(B) then provided that, "[i]n

determining an individual's net earnings from self-employment for purposes of subparagraph (A) of this paragraph * * * the provisions of section 211 of this title *other than paragraphs* (1), (4) and (5) *of subsection* (c) *shall be applicable*" (emphasis added). *Supra*, pp. 5–6. In respondent's view, adopted by the courts below, this latter provision plainly directs that Section 211(c)(5), *excluding* the self-employed practice of law from "self-employment", is to be disregarded in determining "earnings from self-employment" for the purposes of Section 203, thus rendering earnings from such a practice (like other self-employment earnings not excluded from the scope of Section 211) the subject of deductions from benefits.

The legislative history of the 1954 amendment to Section 203 confirms that Congress intended by the amendment to make deductible from retirement benefits earnings from those occupations, including the self-employed practice of law, which were otherwise excluded from the coverage of the Act by Section 211. The conference report concerning the Social Security Amendments of 1954 stated that:

> The House bill, in combining wages and net earnings from self-employment as "earnings" for retirement test purposes, included earnings derived from non-covered employment within the United States as well as net earnings from self-employment derived from certain non-covered trades and businesses. The Senate amendment provided that only earnings arising from covered employment and self-employment shall be included in "earnings" for retirement

> test purposes. * * * The Senate recedes. [House Report No. 2679, 83d Cong., 2d Sess., p. 17, U.S. Code Cong. and Admin. News, 83d Cong., 2d Sess., p. 3811.]

In sum, the relevant legislative history, as well as the language of the statute, sustain the holding below that Section 203, as altered in 1954, contemplated the deduction of a self-employed lawyer's earnings from any retirement benefits to which he might be entitled.*

2. Petitioner argues that, if the 1954 amendment did purport to apply a new deduction provision to persons who had already been awarded benefits at the time of its enactment, the amendment violates the Due Process Clause of the Fifth Amendment in that it works a "deprivation of property rights previously acquired" by such persons (Pet. 6). An identical contention was rejected by this Court in *Flemming* v. *Nestor*, 363 U.S. 603, which involved Section 202(n) of the Social Security Act, 68 Stat. 1083, as amended,

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* Petitioner contends that, assuming that the 1954 amendment to Section 203 did alter the law, it nevertheless should be construed to be inapplicable to persons whose entitlement to benefits accrued before the effective date of the amendment (Pet. 5–6). The statute, however, contains no such limitation. To the contrary, the amendment plainly states that Section 203(b) is to "be applicable in the case of monthly benefits under Title II of the Social Security Act for months in any taxable year (of the individual entitled to such benefits) beginning after December 1954." 68 Stat. 1077. This 1954 amendment, making all earnings of retirement benefit recipients a basis for reduction of their benefits, marks a change of Congressional policy. There is no tenable basis for arguing that current beneficiaries, such as petitioner, are in an excepted category.

42 U.S.C. 402(n), providing for the termination of the benefits payable to an alien who is deported on certain grounds. The District Court held the section violative of the Fifth Amendment with respect to an alien who had already become entitled to benefits, ruling that the provision deprived him of "an accrued property right." 169 F. Supp. 922, 934 (D.D.C.). On direct appeal, this Court reversed, holding that the social security program does not confer accrued property rights on covered employees. The Court emphasized that the benefits granted by the Act are to be deemed noncontractual benefits under a social welfare program which Congress is free to modify at any time.[7]

Of course, as was noted in *Nestor*, Congress may not "exercise its power to modify the statutory scheme free of all constitutional restraint." 363 U.S. 603, 611. There can, however, be no serious question of Congress' power to eliminate, prospectively, the preferential treatment orginally accorded by the statute to professional earnings. Petitioner's argument to the contrary (Pet. 6) rests wholly upon generalities as to the arbitrary exercise of power, and does not

[7] Petitioner attempts to distinguish the *Nestor* case by pointing out that Nestor, unlike petitioner, had not yet become eligible for benefits when the allegedly "divesting" statute was enacted. As the court below pointed out (Pet. App. 24), however, this Court's decision in *Nestor* does not rest on the narrow ground that Nestor, himself, had not acquired a property right under the Social Security Act. The clear import of the opinion is that the Act grants no property rights at all—even with respect to persons who have attained eligibility for the benefits provided.

come to grips with the particular bases of the Congressional action in 1954.

3. Section 203(e)(2)(D) of the Act, as amended in 1954, *supra*, p. 5, provides that no deductions from benefits should be charged to any month in which the individual in question "did not engage in self-employment and did not render services for wages * * * of more than $80.00." Section 203(e)(3)(B), *supra*, pp. 5–6, provides that self-employment during a month is to be presumed unless the individual shows to the satisfaction of the Secretary that he "rendered no substantial services in such month * * *". It is then provided that the "Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business."

Petitioner claims that the Social Security Administration improperly charged his benefits with deductions for certain months in 1955 when his income from his law practice was not in excess of $80.00 (Pet. 10–11). The respondent, following his regulations,[4] ruled that the question of whether petitioner had performed "substantial services" in those months was to be determined by the extent of petitioner's professional activity during the months, and not by the remuneration received by him for that activity. This interpretation of Section 203(e)(3)(B) is correct. Section 203(e)(3)(B), unlike the preceding provision in 203(e)(2)(D), does not refer to wages received, but makes the issue of whether an indi-

[4] See 20 C.F.R. § 404.416, 20 F.R. 2660, 16 F.R. 13051.

vidual engaged in self-employment turn solely on the extent to which he *rendered services*. Petitioner's contention is thus at odds with the applicable statutory language. As the court of appeals stated (Pet. App. 25):

> * * * the amount of money earned per month is not at all determinative whether an individual is self-employed. And we agree with the Referee that the "substantial services" rendered by a self-employed individual are not measured by the amount of remuneration received during a period but rather means "work and activity in the prosecution of a profession."*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1961.

* Petitioner erroneously suggests that, if the Act does make deductions chargeable to certain months on the basis of work activity rather than earnings, it is so arbitrary as to violate the Fifth Amendment (Pet. 10). Congress apparently recognized that remuneration (particularly in the case of the professions) often comes at irregular intervals in relation to the work activity to which it is attributable. The activity itself can therefore be considered the best guide as to when the remuneration was actually earned.

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